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REVIEW ESSAYS

Tribe's Judicious Feminism

Professor Anita L. Allen*

ABORTION: THE CLASH OF ABSOLUTES. By Laurence H. Tribe. New York: W.W. Norton & Co., Inc. 1990. 242 pp. \$19.95.

I. INTRODUCTION

The title of Professor Laurence Tribe's recent book, *Abortion: The Clash of Absolutes*, brings to mind the din and fury of battle. However, beyond the brash red, white, and blue book jacket, one finds not a battlefield, but a courtroom of quiet reason. The Harvard scholar's serene assessment of abortion rights promises to illuminate for a wide audience both why the demands of pro-choice feminists are not constitutionally extreme and why the purported policy compromises initiated by pro-life forces fail to qualify as compromises at all. Indeed, Tribe's judicious defense of the liberal pro-choice perspective has already found favor in surprising quarters. Journalist Nat Hentoff, the self-described "atheist civil-libertarian pro-lifer," praises Tribe's presentation of the right to privacy as unusually "lucid."¹

The "absolutes" Tribe refers to are the strongly held belief in a woman's right to choose whether to terminate her pregnancy, and the equally strong belief in a fetus's right to life. Professor Tribe's optimistic central thesis is that the clash between these absolutes is not an insurmountable obstacle to compromise: that the abortion issue need not produce irreconcilable conflict between groups favoring women's rights on the one hand and those favoring fetal rights on the other. Acknowledging the development of seemingly absolute values on abortion in contemporary America, Tribe maintains that "[f]ar from being inevitable outgrowths of the natural order of things, these competing values are socially constructed."² He concludes that understanding the social origins of these competing values paves the way for genuine compromise.

The image of the abortion issue as a clash of absolutes is apt in many respects, whether one views the values at stake as natural and immutable or, with Tribe, as socially constructed. The aptness of Tribe's image is strongly

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1. Nat Hentoff, *Abortion: Seeking a Common Ground*, BOSTON GLOBE, June 10, 1990, at B43.

2. P. 27.

suggested by at least a quarter century of public discussion and scholarly inquiry about abortion which centered on the "right to privacy" and the "right to life." But the image of the abortion issue as a clash of absolutes is also potentially misleading. Whether a woman's right to privacy ought to outweigh a fetus's right to life is but one normative question abortion policy raises. Tribe's unidimensional metaphor fails to capture other important questions that the abortion debate brings to mind.³ Yet Tribe's profile of abortion policy is no mere sketch of a major public controversy. Details of history and constitutional theory make his study admirably complete.

My goals here are first to convey the thrust of Tribe's perspective, and second to briefly evaluate Tribe's arguments for abortion privacy and against fetal personhood. Arguing with special clarity, Tribe defends the constitutional privacy doctrine and its application to abortion laws on grounds that will sound familiar to the legal academy. Revealing his considerable feminism, Tribe's appeals to constitutional equal protection doctrines and to the history of gender roles to justify liberal abortion laws are more refreshing. Falling only somewhat short when he attempts to defend claims that a woman's right to choose is fundamental to constitutionally protected liberty, Tribe's critical response to claims made on behalf of the fetus falls further from the mark.

II. WOMEN'S RIGHT TO PRIVACY

A. *Privacy Losing Ground*

Quite apart from the abortion issue, the idea of a fundamental right to privacy is losing ground. Its demise was foretold when, in *Bowers v. Hardwick*, the fundamental privacy right failed to protect sexual intimacy be-

3. Since the 1970s, academic philosophers with an interest in abortion law have focused on questions relating to whether the unborn are persons, whether the unborn have a right to life, and whether women's liberty, privacy, equality, or bodily integrity justify autonomous abortion choices. See, e.g., *THE RIGHTS AND WRONGS OF ABORTION* (Marshall Cohen, Thomas Nagel & Thomas Scanlon eds., 1974). They have also focused on whether parenthood or parenting obligations countermand abortion and whether just governments may impose or limit childbearing. See, e.g., Sara Ann Ketchum, *The Moral Status of the Bodies of Persons*, 10 *SOC. THEORY & PRAC.* 25 (1984); Steven L. Ross, *The Death of the Fetus*, 11 *PHIL. & PUB. AFF.* 232 (1982); Roger Wertheimer, *Understanding the Abortion Argument*, 1 *PHIL. & PUB. AFF.* 67 (1971); Mark R. Wicclair, *The Abortion Controversy and the Claim That This Body is Mine*, 7 *SOC. THEORY & PRAC.* 337 (1981). The requirements of virtue ethics, an ethic of care, and of moral decisionmaking-in-context have captured the attention of some philosophers interested in abortion, including some feminist philosophers. See, e.g., Kathryn Pyne Addelson, *Moral Passages*, in *WOMEN AND MORAL THEORY* 87 (Eva Feder Kittay & Diana T. Meyers eds., 1987); Rosalind Hursthouse, *Virtue Theory and Abortion*, 20 *PHIL. & PUB. AFF.* 223 (1991). Some have recently begun to raise questions about the varied meanings diverse ethnic groups attach to pregnancy and abortion.

At the same time, lawyers have focused primarily on questions of constitutional interpretation and adjudication, "fundamental" rights, federalism, the public/private distinction, the role of religion and morality in constitutional law, anonymous recordkeeping, the legal status of the fetus, equal protection for women and the unborn, public funding of poor women's abortions, regulating prenatal conduct, and the rights of minors. For a recent bibliography of such legal writing, see ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY*, 199 n.16, 200 nn. 28-30, 201 nn.32-33, 202 nn.52 & 54, 203 nn.60-61 (1988).

tween consenting adults.⁴ The Supreme Court in *Bowers* upheld a Georgia criminal statute under which a man was charged after police discovered him engaging in homosexual sodomy in his own home.

Arguably, *Bowers* implied no adverse destiny for the right to privacy doctrine; the decision merely pronounced that the Court would limit fundamental privacy protection to heterosexual intercourse, reproduction, and family life. However, the majority opinion of Chief Justice Rehnquist in *Cruzan v. Director, Missouri Department of Health* was more clearly a dirge.⁵ In the name of Nancy Cruzan's "privacy," Justice Rehnquist asked only whether her Fourteenth Amendment liberty interest was violated by the Missouri Supreme Court's ruling that "clear and convincing evidence" of her own wishes must be presented in proceedings brought to terminate life sustaining treatment.

Why is the concept of a fundamental constitutional right to privacy—one requiring strict judicial scrutiny—losing ground in the Supreme Court? Why is the privacy argument for abortion rights not holding sway with vocal segments of the general public? What is the case for federal constitutional protection of abortion choice? *Abortion: The Clash of Absolutes* is perhaps best viewed as a respected scholar's response to just these questions.

Early in his book, Professor Tribe traces the evolution of women's constitutional right to abortion from *Roe v. Wade*⁶ to *Webster v. Reproductive Health Services*.⁷ Tribe explains how, after pronouncing in *Roe* that women have a "fundamental" right to decide whether to have an abortion, the Court initially "issued a series of opinions both reaffirming the rules of *Roe* and . . . applying them to specific cases."⁸ Yet, Tribe notes, a dramatic change in the composition of the Court in the 1980s winnowed the 7-2 *Roe* majority to a narrow 5-4 margin. The Court's 1989 *Webster* decision produced only "four solid votes to reaffirm *Roe*," after which "the tenuous nature of the constitutional right to choose to terminate a pregnancy was evident to anyone who could count."⁹ Since the publication of Tribe's book, the Supreme Court has handed down new decisions upholding abortion restrictions. The right to choose abortion has become more tenuous still. With the retirement of Justice Thurgood Marshall, abortion privacy is threatened with imminent extinction.

A number of academic commentators have been deeply critical of the legal evolution Tribe soberly recounts. Reacting to *Webster*, Ronald Dworkin accused the plurality of premising its attack on *Roe* on "stunningly bad argument."¹⁰ Indeed, one may wonder whether the Court made any argu-

4. *Bowers v. Hardwick*, 478 U.S. 186 (1986); Cf. Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 746-47 (1989) (arguing that *Bowers* may foretoken the decline of the privacy doctrine).

5. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

6. 410 U.S. 113 (1973).

7. 492 U.S. 490 (1989).

8. P. 14.

9. P. 20.

10. Ronald Dworkin, *The Future of Abortion*, N.Y. REV. BOOKS, Sep. 28, 1989, at 47, 47.

ment at all in *Webster*. The Court appeared to ignore the wealth of arguments in defense of *Roe* that have emerged since 1972, rejecting *Roe* without explaining "what, if anything, was wrong with the decision."¹¹

For all the build-up that it received, the *Webster* case was a phenomenal disappointment when it came to settling the fate of *Roe*, the constitutional privacy doctrine, and the constitutional status of the unborn.¹² Subsequent Supreme Court cases have been no better. Each one validated restrictions on abortion imposed by state or federal authorities, and yet none directly confronted *Roe*.

In two 1990 abortion cases, *Hodgson v. Minnesota*¹³ and *Ohio v. Akron Center for Reproductive Health*,¹⁴ the idea of the abortion right as fundamental, and thus commanding the strict judicial scrutiny of compelling state interest analysis, played no role in the majority opinions. Indeed, in *Hodgson* Justice Stevens stood with Justice O'Connor rather than his more liberal colleagues to uphold restrictions on abortions that do not "unduly burden" the fundamental rights of minors.¹⁵ Skirting *Roe*'s requirement that government justify abortion restrictions on the basis of compelling public interests, Justice O'Connor would have the Court test the constitutionality of abortion restrictions on the basis of whether such restrictions impose an "undue burden" on a fundamental right.¹⁶

In the 1991 decision, *Rust v. Sullivan*,¹⁷ Justice O'Connor partly agreed with abortion liberals on the Court. Along with Justices Blackmun, Marshall, and Stevens, she declined to join a five justice majority in upholding recently reinterpreted abortion restrictions promulgated by the Secretary of Health and Human Services pursuant to Title X of the Public Health Services Act.¹⁸ The majority held that "gag rule" regulations prohibiting the dissemination of medical information or advice about abortion were a reasonable interpretation of earlier statutes prohibiting abortion-related activities in family planning programs receiving federal funds. Justice Rehnquist argued for the majority that, without abridging constitutionally protected free speech or due process, "government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'"¹⁹ Describing the majority analysis as "facile" and "disingenuous," Justice Blackmun countered that First and Fifth Amendment rights of speech and privacy invalidate the Title X gag rule.²⁰ But Justice O'Connor's *Rust* dissent shined no ray of hope on the survival of the

11. Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 84 (1989).

12. See Anita L. Allen, *Webster Marks Time*, 2 BIO LAW U:1531 (Sep./Oct. 1989).

13. 110 S. Ct. 2926 (1990).

14. 110 S. Ct. 2972 (1990).

15. *Hodgson*, 110 S. Ct. at 2944.

16. *Id.* at 2949-50 (O'Connor, J., concurring in part); see also Anita L. Allen, *Court Disables Disputed Legacy of Privacy Right*, NAT'L L.J., Aug. 13, 1990, at S8, S14.

17. 111 S. Ct. 1759 (1991).

18. *Id.* at 1778 (Blackmun, J., dissenting).

19. *Id.* at 1772 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

20. *Id.* at 1778 (Blackmun, J., dissenting).

abortion privacy doctrine. She avoided premising her dissent on substantive privacy rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. Rather, citing canons of statutory construction, she argued that "neither the language nor the history of [the Public Health Service Act] compels the Secretary's interpretation, and . . . the interpretation raises serious First Amendment concerns."²¹

B. *Abortion Privacy as Constitutional and Fundamental*

With an eye toward rehabilitating the right to choose, Professor Tribe surveys the pro-choice arguments and analyzes the constitutional basis for a woman's right to terminate her pregnancy. But first he pauses over two common procedural objections to *Roe* and its progeny: (1) that the right to privacy is not in the text of the Constitution, and (2), its corollary, that legislators, not judges, should decide the abortion question.

Reacting to the former objection, Tribe emphatically disputes the conservatives' view, shared by Chief Justice Rehnquist and Justices Scalia and White, that the Due Process Clauses provide only procedural protection against the deprivation of liberty.²² Tribe points out that a long line of Supreme Court decisions has held that the protection of "liberty" contained in the Fourteenth Amendment's Due Process Clause has the effect of applying the Bill of Rights (the text of which refers only to the federal government) with equal force to the states. Since the Bill of Rights undeniably contemplates substantive rights, "the claim that the liberty clause is 'entirely' procedural is unsustainable."²³ Thus, the issue for Tribe becomes whether the meaning of "liberty" under the Fourteenth Amendment is limited to the protections specifically listed in the Bill of Rights.

The answer to this question seems obvious to Tribe: The Constitution was not intended to be, and has never been interpreted as being, a comprehensive list of the rights of the people—" [T]he Supreme Court has consistently recognized that in adopting the Constitution the people did *not* mean to place the bulk of their hard-won liberty in the hands of government save only for those rights specifically mentioned."²⁴ Consequently, the fact that the word "privacy" does not appear in the Constitution does not preclude judicial recognition of a constitutional right to privacy.

As for the latter objection, that legislators represent the people, and therefore they, not judges, should resolve the abortion issue, Tribe concedes that *Roe* may be antidemocratic. But he convincingly counters that "[t]he whole *point* of an independent judiciary is to be 'antidemocratic,' to preserve

21. *Id.* at 1789 (O'Connor, J., dissenting).

22. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989))).

23. P. 87.

24. P. 90.

from transient majorities those human rights and other principles to which our legal and political system is committed."²⁵ Thus, if there is a constitutional right to abortion, Tribe argues, it is the Supreme Court's *duty* to be antidemocratic by striking down any state legislation that violates that right.²⁶

As one might expect, a direct substantive defense of the jurisprudence of *Roe* is an important step in Tribe's overall analysis. He argues that a woman's right to an abortion is grounded in the constitutional right to privacy, and that it is a fundamental right, which states may restrict only with the most compelling justifications.

Reciting pertinent history, Tribe notes that *Skinner v. Oklahoma*²⁷ was the first case in which the Supreme Court applied the fundamental right of privacy to reproduction. There, the Court struck down an Oklahoma statute prescribing the forced sterilization of certain criminals, recognizing what Tribe calls "the grotesque disempowerment that could occur if the choice of whether to beget a child were transferred from the individual to the state."²⁸ Later, in *Griswold v. Connecticut*²⁹ and in *Eisenstadt v. Baird*,³⁰ the Court struck down state statutes restricting the use of contraceptives. According to Tribe, "[w]hat is really protected as a fundamental right in the contraception cases is the right to engage in sexual intercourse without having a child."³¹ Since abortion implicates this very right, and since forcing a woman to undergo the rigors and possible stigma of unwanted pregnancy and childbirth is an even greater personal invasion than regulation of contraceptives, it seems fair to say that a woman's right to terminate her pregnancy is fundamental.

In classifying a woman's right to choose abortion as "fundamental," Tribe refers to the Court's "long tradition of asking *first* about the right that is asserted, to see whether it is a fundamental liberty, and only *then* turning to the reasons, such as protection of the fetus's right to life, that might nonetheless justify that liberty's abridgment."³² By thus challenging the perspective that the effect of abortion on the fetus must be considered in the very formulation of women's right to abortion privacy, Tribe takes on two of the Supreme Court's most ardent foes of *Roe*. Justices Scalia and White define women's liberty in the abortion context in just this way, contemplating that the right to kill a fetus cannot plausibly be considered fundamental.³³

25. P. 80.

26. See also Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. BOOKS, July 18, 1991, at 23, 23 (book review) ("America's principal contribution to political theory is a conception of democracy according to which the protection of individual rights is a precondition, not a compromise, of that form of government.").

27. 316 U.S. 535 (1942).

28. P. 93.

29. 381 U.S. 479 (1965).

30. 405 U.S. 438 (1972).

31. P. 94.

32. P. 96.

33. P. 97 (referring to Justice Scalia's opinion in *Michael H. v. Gerald D.*, 491 U.S. 110, 124

Tribe states that this approach, applied across the board, "would do violence to all our rights."³⁴ For example, the state's power of military conscription, which obviously impairs fundamental liberties, is available only under compelling circumstances. The state may not, for example, draft its citizens merely to act as chauffeurs for public officials. However, Tribe argues that under the Scalia and White approach a citizen's right not to be made a chauffeur would be defined as the right to inhibit efficient chauffeur service for public officials, which no one regards as a fundamental right. "If we incorporate the state's reason for its regulation into the initial definition of the liberty," Tribe writes, "the fundamental nature of that liberty *inevitably vanishes*."³⁵ Perhaps the fundamental character of sexual autonomy vanished in *Bowers* because the Court quickly embraced moral tradition as a "reason" for regulating homosexuality. The better approach in the abortion context is first to determine whether the woman's interest in terminating her pregnancy is a fundamental right, and *then* to consider whether the state has a compelling interest in restricting it.

The question of fundamentality should drive courts toward an assessment of how valuable the liberty—whether to choose abortion or to choose homosexual intimacy—is to the overall liberty of the right-holder. Persuading non-believers that private abortion choices are a fundamental liberty is crucial for the liberal cause. Professor Tribe does a fine job, as others have done,³⁶ of countering the argument that the right to privacy lacks a textual basis. He also does a good job of formulating the practical and conceptual links between abortion rights and constitutional liberty for women.

Less adequate is his account of the practical and conceptual links among constitutional liberty, abortion rights, and privacy. It is in explaining what privacy—in its several senses—has to do with constitutional liberty and abortion rights that Tribe's discussion falls somewhat short. This deficiency is significant. Robert Bork, for example, has argued not only that the general right to privacy is not contained in the text of the Constitution, but also that he cannot grasp the purported conceptual link between that right and abortion.³⁷

To get a grip on the connections among constitutional liberty, abortion rights, and privacy, it is useful to consider the interests of individuals that are threatened when governments attempt to curtail abortion choices.³⁸ In *Whalen v. Roe*, the Supreme Court in effect noted three main "privacy" interests amenable to legal protection: (1) an interest in autonomous decision-making, (2) an interest in confidentiality, and (3) an interest in physical

n.4 (1989) (plurality opinion), and Justice White's dissenting opinion in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting)).

34. P. 97.

35. P. 98.

36. See, e.g., DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 231-81 (1986).

37. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 97, 111-16 (1990).

38. See A. ALLEN, *supra* note 3; Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461 (1987).

seclusion.³⁹ Privacy in all three of these important senses is at stake in the choice of competing abortion policies.

At issue primarily is the interest of all women in making choices about reproduction that are not mandated by government. Autonomous choices, free of the controlling interference of public officials, are "private" choices. To believe in the right to privacy, we need not believe that nature divides social life literally into public and private realms.⁴⁰ We can coherently describe the condition of being relatively free of the most direct, consequential, and commonly offensive governmental interference as our "privacy." In this sense of the term, "privacy" connotes autonomy, liberty, freedom, and the peace of mind which stems from the independent exercise of one's own judgment.⁴¹

Restrictive state regulation of abortion threatens a second "privacy" interest: the confidentiality of the physician-patient relationship. This form of privacy calls for a strong presumption in favor of confidential record keeping and anonymous public reporting. A third "privacy" interest touched by restrictive abortion laws is the interest in physical seclusion.⁴² This interest is at once an interest in restricting access to one's body and restricting access to one's home or other physical retreat. For example, many forms of physical contact actionable as battery or trespass in tort law interfere with the interest in seclusion. Crowded accommodations—or intimacy and responsibility within spacious ones—also interfere with seclusion. Typical American homes are a secure retreat from strangers, but whether a person's home is also a shelter from unwanted contact with intimates depends upon variables such as family size and responsibilities. For most people in our society, women especially, the responsibilities of parenting small children cut deeply into opportunities for privacy. The ability to control reproduction is therefore an important precondition of privacy at home.

Abortion cases from *Roe* through *Thornburgh v. American College of Obstetricians and Gynecologists*⁴³ repeatedly emphasized the importance of autonomous decisionmaking. *Thornburgh* emphasized both autonomous decisionmaking and confidentiality.⁴⁴ No court has noted the distinct privacy implications of childbearing on the traditional understanding of the home as a peaceful retreat, however Justice Blackmun's opinion in *Roe* broached without approval the notion that the Constitution might protect

39. *Whalen v. Roe*, 429 U.S. 589, 598-600 & n.24 (1977).

40. See HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958); cf. Howard B. Radest, *The Public and the Private: An American Fairy Tale*, 89 *ETHICS* 280 (1979) (arguing that room for privacy might be found in the interaction between polity and community).

41. Cf. Joseph Kupfer, *Privacy, Autonomy and Self-Concept*, 24 *AM. PHIL. Q.* 81, 82 (1987) ("[P]rivacy is essential to the development and maintenance of an autonomous self. . . . [A]utonomy . . . includes a concept of oneself as a purposeful, self-determining, responsible agent.").

42. I explore this less familiar argument for abortion rights in *Uneasy Access*. A. ALLEN, *supra* note 3, at 54-81.

43. 476 U.S. 747 (1986).

44. The Court invalidated state data-collection requirements that would place otherwise confidential information about individual abortion patients into the hands of public authorities, condemning these requirements as unconstitutional indirect constraints on abortion rights guaranteed in *Roe*.

bodily integrity. He expressly rejected the argument of certain *amici* that criminal abortion statutes should be constitutionally invalidated on grounds of interference with women's bodily integrity. Then, in one of the most confusing passages in *Roe*, he suggested that as pregnancy progresses a woman "cannot be isolated."⁴⁵ Because a woman and her fetus function as a biological unit, Justice Blackmun inferred that government has grounds under the constitution for limiting her autonomy.

The inference here, that women who lack privacy in the sense of physical seclusion therefore lack privacy in the sense of autonomous decisionmaking, fallaciously conflates two distinct senses of "privacy." Moreover, Justice Blackmun's characterization of pregnant women as *ipso facto* not "isolated" problematically assumes that the unborn are the metaphysical and moral equivalents of persons for purposes of describing conditions of privacy. To treat the unborn as relevant for purposes of the discourse of physical seclusion, even though they do not watch and listen in ways that give rise to modesty and shame, requires an argument.

Justice Blackmun's opinion in *Roe* was not successful in setting out the conceptual connection between privacy and abortion.⁴⁶ He failed to distinguish carefully the physical privacy of seclusion from the decisional privacy of liberty or autonomous choice. One might ascribe a similar failure to Justice Douglas. His majority opinion in *Griswold* did not carefully distinguish the physical privacy of a marital bedroom unpoliced by law enforcement agents from the decisional privacy of liberty to seek, purchase, and use contraception.⁴⁷ Justice Douglas's potentially confusing appeal to the concept of privacy, combined with his vague assertion that the right to privacy subsists in the penumbra of the Constitution's express provisions, cast a regrettable shadow over the Court's first announcement of fundamental privacy protection.

These admitted inadequacies were never a sign that a jurisprudence of fundamental privacy was inherently untenable. Indeed, the straightforward jurisprudence of privacy elaborated in *Roe*'s progeny is not weighed down by the ambiguity and metaphor that marred the earliest efforts. *Thornburgh* cites the textual liberty of the Fourteenth Amendment as a source of substantive fundamental rights, concluding that having a choice about whether to bring a child into the world numbers among the constitutionally protected fundamental liberties.⁴⁸ In fact, the argument of *Thornburgh* is that few liberties are more critical to the lives of young women than the ability privately to choose whether to bear children. Rights protecting sexual autonomy, contraceptive choice, and abortion choice are therefore key resources for women.

It is noteworthy that the Justices who have cast their votes in favor of

45. *Roe*, 410 U.S. at 159.

46. See Allen, *supra* note 38, at 468.

47. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

48. *Thornburgh*, 476 U.S. at 772.

upholding abortion restrictions have not expressly grappled with what the dissent in *Webster* termed the "inevitable and brutal consequences" of anti-abortion laws.⁴⁹ Approximately 1.5 million preteen, teenage, and adult women obtain abortions each year.⁵⁰ Abortion was exceedingly common prior to *Roe*, when as many as 330,000 illegal abortions were performed each year.⁵¹ Legislated limitations on abortion will most severely affect poor women. To severely affect impoverished Americans is to severely affect blacks and Hispanics, who are disproportionately poor. At present, 43.2 percent of black women with children under 18 live in poverty.⁵²

Children, even wanted children, impose special burdens on the poor. School-aged girls and working women lack adequate daycare and welfare assistance for their children. While some pregnant women can count on adoption to provide homes for unwanted children, adoption is not an attractive option for women whose black, ill, or handicapped children would likely not be placed in adoptive homes. Ideally, the Supreme Court would refrain from cementing unworkable, sentimental ideals of family life into constitutional law. Yet the Supreme Court has often done just that, to the detriment of the least advantaged. The Court has upheld the constitutionality of legislation banning state and federal medicaid funding for elective abortion and prohibiting doctors in federally funded family planning clinics from mentioning abortion as an option for their patients. Decisions like *Rust*,⁵³ *Webster*,⁵⁴ *Harris v. McRae*,⁵⁵ *Poelker v. Doe*,⁵⁶ and *Maher v. Roe*⁵⁷ legitimate the imposition of maternity on lower income women.

If state and federal governments ultimately succeed in erecting prohibitive barriers to abortion, as several have already done, the number of self-induced and unlicensed abortions may rise to alarming pre-*Roe* levels. It was not surprising that, as anxieties about the overturning of *Roe* reached fever pitch prior to the *Webster* decision, a California group disseminated a video about a do-it-yourself abortion technique they called "menstrual extraction."⁵⁸

These evocative social concerns bear directly on the constitutional rights of women. They are the context for answering the question, posed by consti-

49. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 558 (1989) (Blackmun, J., concurring in part and dissenting in part).

50. The figure is widely cited. See, e.g., Phillip Elmer-DeWitt, *A Bitter Pill to Swallow: Birth Control in the U.S. is Out of Date—and Getting More So*, TIME, Feb. 26, 1990, at 44, 44.

51. Russell S. Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3, 6 (Harold Rosen ed., 1967) (rev. ed. of THERAPEUTIC ABORTION (1954)).

52. David H. Swinton, *The Economic Status of African Americans: "Permanent" Poverty and Inequality*, in THE STATE OF BLACK AMERICA 1991, at 25, 43 (Janet Dewart ed., 1991) (summarizing government statistics).

53. 111 S. Ct. 1759 (1991).

54. 492 U.S. 490 (1989).

55. 448 U.S. 297 (1980).

56. 432 U.S. 519 (1977).

57. 432 U.S. 464 (1977).

58. NO GOING BACK: A PRO-CHOICE PERSPECTIVE (The Federation of Feminist Women's Health Center 1989) (on file with author). This 28-minute film is available from the producers in Los Angeles.

tutional courts themselves, of how deeply liberty is touched by abortion restrictions. Liberty is so deeply affected that thousands of women would rather risk infertility or death in unskilled hands than carry their pregnancies to term.

Tribe's sympathetic explication of the jurisprudence of *Roe* potentially reassures readers that there is a defensible constitutional argument for abortion rights. But the argument Tribe defends has proven to be controvertible. One kind of critic admits that the right to privacy is fundamental and that abortion is conceptually and practically linked with privacy, but fails—even after all the social evidence is in—to be persuaded that abortion rights are important enough to the experience of privacy to warrant constitutional protection. Indeed, the fact that abortion rights are not explicitly protected in the Constitution and are not universally demanded strikes some as evidence that anti-abortion statutes must not be a constitutionally significant imposition on a fundamental right.

Uncongenial to any "fundamental" conception of privacy rights, Chief Justice Rehnquist and Justice White maintain that the argument for treating abortion rights as fundamental is particularly weak.⁵⁹ Closely reading the relevant precedents, they deny that abortion rights are deeply rooted in the history and tradition of the nation.⁶⁰ They deny, too, that abortion rights are essential to the concept of ordered liberty.⁶¹ Because they believe abortion fails these constitutional tests, they conclude that abortion privacy is not a fundamental right under the Fourteenth Amendment.

Tribe's indirect answer to these arguments is a historical survey of the roots of both the "pro-life" and "pro-choice" movements in this country from the American Revolution to the present. Tribe stresses an observation mentioned by Justice Blackmun in *Roe*. Abortion was legal and not uncommon in late eighteenth and early nineteenth century America.⁶² Because children were regarded as economic assets to western frontier families, women who sought abortions were primarily single women. Therefore, any negative connotations attached to abortion stemmed not from pro-life sentiments, but from the view that premarital sex was immoral.⁶³

However, abortion at this time was by no means as safe a procedure as it is today—Tribe cites a 30 percent death rate for all surgical abortions in

59. See *Thornburgh*, 476 U.S. at 785-814 (1986) (White, J., joined by Rehnquist, C.J., dissenting). But cf. Justice Powell's opinion in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("Constitution protects the sanctity of the family because the institution . . . is deeply rooted in [U.S.] history and tradition.").

60. *Thornburgh*, 476 U.S. at 793-94 (White, J., dissenting); cf. *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (arguing that the Fourteenth Amendment Liberty Clause incorporates only those rights that are essential to ordered liberty).

61. *Thornburgh*, 476 U.S. at 790-94 (White, J., dissenting). But cf. *Moore*, 436 U.S. at 499-504 & n.10 (plurality opinion) (arguing that the protections of the Fourteenth Amendment cannot be limited by arbitrary line drawing).

62. *Roe*, 410 U.S. at 138; pp. 28-29; see also DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 202-07 (1989).

63. P. 29.

early nineteenth century New York.⁶⁴ Thus safety concerns soon led to the first statutory regulation of abortion, passed in Connecticut in 1821. The Connecticut statute did not prohibit all abortions, but only those induced through the use of dangerous poisons. Fetal protection, Tribe concludes, was not the statute's goal. The genesis of the movement to restrict abortion in the United States "was neither religious belief nor a popular moral crusade."⁶⁵ On the contrary, the movement was the product of an organized lobbying effort by the medical profession in the mid-nineteenth century.

The doctors were spurred by two concerns. First, for both safety and business reasons, they wished to eliminate the performance of abortions by irregular physicians and by apothecaries promising miracle abortion techniques. Second, the notion that the fetus is a human life gained increasing acceptance throughout the medical profession. An elite profession with an increasingly technical appreciation of inner anatomy, they drew moral conclusions from the physiological fact that the unborn come to possess distinctly human traits many weeks prior to delivery from the womb. To advance their views, physicians organized a national lobbying effort, using arguments designed to strike a responsive chord in the hearts of the people. These included assertions that abortion is murder, which influenced the powerful Catholic Church, and that abortion poses a threat to traditional sex roles by enabling women to escape their duty as childbearers.⁶⁶

In time, the efforts of the medical profession "altered the prevailing attitudes about the practice [of abortion] in the United States."⁶⁷ By the turn of the century, more than forty states had passed statutes restricting abortion to instances when it was necessary to save the life of the woman.⁶⁸ According to Tribe, a movement to reform the strict abortion laws began in the 1950s. Women's groups began to call for the repeal of restrictive laws, but by 1973, when *Roe* was adjudicated, only four states had guaranteed women the right to terminate their own pregnancies. Tribe concludes that, had the Supreme Court not intervened in *Roe* by invalidating anti-abortion statutes, most states would not have repealed their restrictive laws.⁶⁹

Tribe states that the true motivation for abortion restrictions appears to stem not from a belief that the fetus is a person, but from the desire to reinforce the traditional role of women as virtuous childbearers.⁷⁰ In defense of this contention, Tribe points out that abortion is the "only . . . place in the law where a really significant and intimate sacrifice has been required of anyone in order to save another."⁷¹ Because abortion restrictions burden only women, "a ban [on abortion] places women, by accident of their biol-

64. *Id.*

65. P. 30.

66. Pp. 30-34.

67. P. 30.

68. P. 34.

69. Pp. 35-51.

70. His discussion of the rape or incest exception most clearly illustrates this point. Pp. 233-34.

71. P. 131.

ogy, in a permanently and irrevocably subordinate position to men."⁷²

While abortion opponents generally favor allowing the procedure in cases of rape or incest, they would prohibit abortion in cases of simple contraceptive failure. According to Tribe, this inconsistency suggests that the key to the antiabortion view is not the voluntary nature of the pregnancy, but the voluntary nature of the sexual conduct. Thus, it appears that "such antiabortion views are driven less by the innocence of the fetus . . . than by the supposed 'guilt' of the woman."⁷³ Antiabortion statutes are, therefore, attempts to "impose virtue" on women. Further societal disrespect of women's judgment is reflected in statutory requirements that would hamper women in choosing abortions. For example, waiting periods imply "an assumption that a woman making this decision is misguided and is likely to be acting rashly."⁷⁴ Thus, as Tribe maintains and as many feminists have argued, abortion restrictions are merely manifestations of broader societal views about the roles and capacities of women.

C. *The Equal Protection Alternative*

Professor Tribe's endorsement of an equal protection rationale for abortion rights is partly responsive to the concerns of feminists like Catharine MacKinnon and Deborah Rhode, who believe that a privacy jurisprudence fails to capture women's full stake in the abortion question.⁷⁵ Although the Supreme Court's Fourteenth Amendment analysis in *Roe* relied solely on the Liberty Clause, Tribe believes the Equal Protection Clause in the same amendment also substantiates the right to abortion. Given that the *Skinner* Court recognized a fundamental right to control one's own reproduction, and given that laws restricting abortion negatively affect only women's lives,⁷⁶ Tribe believes that such laws "place a real and substantial burden on women's ability to participate in society as equals."⁷⁷

Tribe does well to see equal protection analysis as an additional argument, rather than as a substitute for the privacy-based rationale for abortion rights. Many feminists argue that privacy jurisprudence fails to fully promote, and may actually harm, women's interests. Catharine MacKinnon's *Feminism Unmodified*, which rejects the privacy rationale, may be viewed in

72. P. 132.

73. *Id.*

74. P. 137.

75. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 96-102 (1987); D. RHODE, *supra* note 62. Feminist attacks on the idea of privacy for women began in the nineteenth century. In *Women and Economics*, Charlotte Perkins (Stetson) Gilman "deconstructed" the idea of domestic privacy, demonstrating that middle class homes are not seats of meaningful privacy, especially for married women with children. CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* 248-69 (Carl N. Degler ed., Harper & Row 1966) (1898).

76. Restrictive abortion laws sometimes negatively affect men's lives too. From an economic point of view, for example, unwanted children are burdens for their fathers. Although men have financial responsibility for their children, this burden is both indirect and not of the same character as the burden on women. It does not, therefore, eliminate the equal protection argument.

77. P. 105.

this vein.⁷⁸ While her argument reveals some of *Roe*'s shortcomings, MacKinnon understates the positive influence *Roe* has had in the quest for women's equality.

The real problem is not with the right to privacy as such, but that women have had too much of the wrong kinds of privacy.⁷⁹ The "wrong" kind—that which MacKinnon emphasizes in her attack on *Roe*—is the "privacy" of the domestic sphere, where a dominant man controls sex and home life. The "right" kind of privacy, which MacKinnon disregards, gives women real choices. Privacy can enable some women to escape unhappy and oppressive lives, and others to experience the peace of mind conducive to their making contributions both inside and outside the domestic sphere. Other feminists reject privacy arguments for abortion because the concept of privacy presupposes liberal individualism, a concept they reject as incompatible with women's identities as interconnected, social beings.⁸⁰ Since virtually all cultures value privacy in some form or other, it is not persuasive to argue that privacy is contrary to women's natures or inherently anticomunitarian. Women writers like Emily Dickinson and May Sarton, who did not marry or have children and who deliberately worked in seclusion, illustrate that sweeping rejections of all forms of privacy as "male" and "liberal" are untenable.⁸¹

Despite the checkered history of the concept of privacy in the Western world and the failure of privacy arguments to be completely persuasive in practice, abandoning privacy arguments in favor of an exclusive reliance on equal protection arguments is not the answer. To be sure, equal protection analysis avoids the "substantive due process" quagmire of the privacy-as-fundamental-liberty argument. Yet it does so only at significant cost. Viewed solely as a matter of equal protection, women's reproductive aspirations must be framed in public legal discourse on the model of men's lives. Viewed as a matter of privacy, abortion rights clearly entail equality, and yet women are better able to assert that the autonomy they seek reflects their own experiences, rather than being the strict analogue of the autonomy men enjoy.

It may be possible to make a case for abortion rights that does not expressly refer to privacy.⁸² However, I conjecture that most American women would be unable to articulate fully their concerns about anti-abortion laws without appealing to notions of privacy. In talking about abortion, women commonly say that government should mind its own business. By using the term "privacy" in connection with abortion, women are able to draw

78. C. MACKINNON, *supra* note 75.

79. This is the theme of *Uneasy Access*. A. ALLEN, *supra* note 3, at 70-72.

80. Robin West has argued that the experiences of menstruation, heterosexual intercourse, pregnancy, and breast feeding make the liberal model of the separate, individual person inapplicable to women. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

81. See A. ALLEN, *supra* note 3, at 78-79.

82. For example, a recent 28-minute pro-choice advocacy film delicately evaded the expression "privacy," in an effort to deflect criticism. NO GOING BACK: A PRO-CHOICE PERSPECTIVE, *supra* note 58.

on a wealth of shared meanings, including connotations of autonomy, independence, and respect for others. Tribe wisely refuses to jettison privacy's rich semantic heritage when he embraces an equal protection analysis to support a woman's right to choose.

III. FETAL PERSONHOOD

I have set forth in some detail the kind of case Tribe makes for characterizing abortion choice as a fundamental right. Tribe insists that doing justice vis-à-vis women's fundamental rights requires that particularly strong, "compelling" reasons be adduced if the constraint of abortion choices is to be constitutionally permissible.

Doubtless the most cited putatively compelling reasons to constrain abortion choices refer to the interests of the unborn or the state's interests in the unborn. Have the unborn, in fact, interests that government may weigh? Does government have independent interests in the unborn that it may weigh? Privacy arguments for choice fail to persuade those who believe that the conceptus, embryo, fetus or unborn child (here, collectively, the "fetus") is of paramount moral concern.

Despite the importance of autonomous decisionmaking for women, some believe that the human life developing *in utero* is invested with a special moral quality. Christopher Stone calls this quality "considerateness."⁸³ Others have labelled it "personhood," "potential personhood," "humanity," or "potential humanity." I will call this quality personhood, although few would say that the traits of self-conscious, rational, moral agency usually associated with personhood exist in a fully realized form in the unborn. Still, it is this quality that some see as making the state's interest in fetal life morally compelling.

The argument that it is morally wrong for a woman to procure an abortion because of the unborn's personhood passes over the value of the woman's own personhood. There are *two* quantities of personhood at stake in the context of abortion: that of the woman and that of the fetus. Both entities are invested with human potential, but to different degrees.⁸⁴ The considerable, but nonetheless inchoate potential of the unborn life is in competition with the more tangible potential of the pregnant woman. This "squaring off" of human potential in the moral debates about abortion seems unavoidable.

Judith Jarvis Thomson's famous pro-choice argument premises abortion rights on the notion that women have a property interest in their bodies that is at least as strong as the inconsistent property interest the unborn have in theirs.⁸⁵ Women have a right, therefore, to rid themselves of, as it were, a trespassing fetus. Thomson's understanding of the implications of property

83. CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM*, 43-62, 73-83 (1987).

84. Allen, *supra* note 38, at 485-86.

85. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-49 (1971).

rights and related rights of bodily integrity is arguably severe. Yet, taking a different tack, it can be argued that our society has good reason for preferring the potential of the woman over that of the unborn.

Preferring adult women is a way of rewarding the effort and self-discipline that virtually every adult must bring to the conduct of his or her life. It is also a way of respecting plans and ambitions that may be inconsistent with pregnancy or parenting. It is, finally, a way of acknowledging the special risks of pregnancy to health and wellbeing, and the value, to each person who can consciously choose, of being able to control such risks. Except perhaps in a grossly underpopulated community, these considerations favor preferring the potential of the pregnant woman to that of the fetus. Professor Tribe does not, as I do, baldly state that society should prefer women's potential to that of their fetuses. However, he does plainly imply an overvaluation of the fetus and an untenable undervaluation of women.

As interesting as this sort of moral reflection on the subject of abortion is, it does not directly address what could be the critical legal issue: the constitutional status of the human fetus. Fetuses may be moral persons and yet fail to be legal, constitutional persons.

Tribe maintains that, by stating in *Roe* that the fetus was not a person, the Supreme Court "needlessly insulted and alienated those for whom the view that the fetus is a person represents a fundamental article of faith."⁸⁶ In doing so, the Court galvanized the pro-life movement and politicized the abortion issue. Tribe suggests that, had the Court employed equal protection analysis, it could have avoided this controversy while still articulating a meaningful statement about the rights of women in America.⁸⁷

This intriguing thought is nevertheless misguided. Citizens are concerned not just with the jurisprudential theories the Supreme Court employs, but also with the concrete implications of its decisions. For example, it is doubtful that equal protection arguments against slavery would have been more welcome to the ears of antebellum slaveholders in the American South than arguments against slavery premised on blacks having inalienable, commercial privacy rights over their own persons.

Although he seems to think the Court could have avoided it, Tribe himself takes up the question of the constitutional status of the unborn. He concludes that the fetus cannot be considered a "person" under the Constitution. If it were, abortion would be the legal equivalent of murder. Tribe maintains that treating abortion as murder runs counter to the entire history of Anglo-American law.⁸⁸ Furthermore, no abortions, not even in the case of rape or incest, would be justified if abortion were considered murder. Even some birth control methods, such as the IUD (intrauterine device) and RU-486 (the contragestational "abortion pill" recently developed in

86. P. 135.

87. *Id.*

88. Historically, even when abortion was criminalized in America, it was a lesser crime than murder. P. 121.

France), would be instruments of murder since they prevent the fertilized ovum from implanting in the wall of the uterus.

Some have argued that the Constitution should be interpreted as permitting the states to define the legal status of the fetus as they choose. Tribe counters that this would violate the Fourteenth Amendment, the central purpose of which is "to prevent some states from adopting a narrower view of personhood than others."⁸⁹ Tribe also asserts that if states were allowed to define fetuses as persons, they might enact a variety of fetal endangerment statutes that could "obliterate a pregnant woman's liberty and her very personhood."⁹⁰ Pregnant women could be restricted from eating and drinking what they chose or engaging in any activity the state deemed hazardous to the fetus's health.⁹¹ Thus, Tribe argues, neither the Supreme Court nor the states may legally recognize the fetus as a person.

Tribe's constitutional argument against fetal personhood is philosophically troubling. Like many mainstream legal philosophers, he fails to give close attention to the principles of a jurisprudence of exclusion—the reasons courts should employ in deciding what kinds of entities matter in the law.

The legal community is presently at odds over how best to characterize the legal status of the developing fetus. The unborn clearly matter in American law, but there is wide disagreement concerning the weight to attach to claims made on the basis of fetal health in the face of competing claims about the liberty and fundamental rights of pregnant women. On the one hand, the Anglo-American legal tradition has never accorded the full legal status of "person" to the unborn. For example, the Supreme Court has never held that they are "citizens" of the United States, entitled to the same constitutional rights as fully born persons. On the other hand, the unborn are taken into account in the allocation of property rights and the attribution of criminal and civil responsibility. Property can be bequeathed to the unborn; many states make it a crime to kill a fetus; wrongful birth actions are torts premised on injurious acts or omissions respecting the unborn.

Professor Ronald Dworkin, whose analysis of the constitutional status of the fetus has much in common with Professor Tribe's, argues against this same background of precedent that the best interpretation of constitutional law is that fetuses are not persons.⁹² One can agree with the conclusion Dworkin and Tribe reach without endorsing the mode of argument they employ. Indeed, one strains to understand what rules, principles, standards, or other norms a court facing a question of constitutional personhood is supposed to rely upon.

Both Dworkin and Tribe pose the crucial question—whether fetuses are constitutional persons—and then give less than satisfying answers. They say nothing to illuminate the law's jurisprudence of exclusion, and nothing to

89. P. 126.

90. P. 128.

91. Some of this is already happening. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

92. Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 49, 49.

indicate what specific principles should guide legal thinking about the constitutional rights of the unborn.

In keeping with his philosophy of "law as integrity," one would expect Dworkin to view the law as containing identifiable norms of exclusion discernable through constructive interpretation.⁹³ Dworkin appears to follow his own prescription for legal reasoning when, with respect to fetal personhood, he argues:

The question is one of legal interpretation. The principle that the fetus is not a constitutional person fits better with other parts of our law and also with *our* sense of how related issues would and should be decided if they arose than the rival principle that it is. . . . Apart from anti-abortion statutes, there are few signs *in our law* of the kind of regulation of pregnancy that would be appropriate if the fetus were a constitutional person, and the Supreme Court has never suggested any constitutional requirement of such protection.⁹⁴

When Dworkin invokes "*our* sense of how [fetal personhood] issues would and should be settled," to whose sense is he appealing? Perhaps that of the pro-choice forces within the community, with whom he happens to agree?

The evasion of discord and ambiguity implicit in Dworkin's appeal to "our sense" of how related issues would and should be resolved is alarming. While often legitimate in normative argument, the appeal to moral paradigms and legal expectations becomes indefensible in contexts where profound disagreement exists about the very paradigms and expectations employed. The United States is presently undergoing a crisis concerning appropriate public responses to abortion, prenatal injury and treatment, and the use of fetal tissue in medicine and research, precisely because the applicable norms are unsettled. Neither Tribe's nor Dworkin's interpretative appeal to norms implicit in the law produces persuasive results. Perhaps they could not in areas of the law, like this one, where past political acts and their meanings are themselves controversial. When Dworkin writes that established law or its best interpretation clearly opposes fetal personhood, his rich prose rings of false bravado.

Both Tribe and Dworkin argue that if one deeply probes the totality of one's beliefs about law, it becomes clear that one does not, and cannot, believe that abortion is murder and the fetus is a constitutional person. While feminists may applaud this conclusion, the conservative, conventionalist, and positivist nature of the inquiry—"there are few signs in our law"—is not a distinctly "feminist" or otherwise progressive mode of analysis. Dworkin, especially, lays out no principles to ease the mind of someone who fears that *Roe* is really *Dred Scott* for the unborn. Tribe, on the other hand, obliquely addresses such fears by implying that those who oppose the right to choose abortion often subscribe to a constitutionally untenable tradition that subordinates women. In fact, Tribe's rendition of women's history, rather than

93. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986).

94. Dworkin, *supra* note 92, at 50 (emphasis added).

any narrow constitutional argument, is at the heart of his claim against fetal personhood.⁹⁵

Another distinction between the approaches of Tribe and Dworkin arises out of Dworkin's claim that if a fetus is a constitutional person, then *Roe v. Wade* is "plainly wrong" on equal protection grounds. Knowingly killing a person, says Dworkin, is a crime in every state. Focusing on equality between pregnant women and their potential children, Dworkin does not satisfactorily answer the obvious concern about equality between women and men. Tribe, however, stresses that women have a right to live as freely and capably as do men. He thus avoids the trap that Dworkin falls into when his own requirement of "fit" conflicts with his equal protection analysis. Would a requirement that a woman carry her pregnancy to term fit a system of laws that otherwise eschews good samaritan duties? It seems doubtful. If this requirement were nevertheless imposed, how broad would the exception be? One must ask whether the argument that mothers must make their bodies available to their children means, for example, that the state will require of a parent whose fatally ill child needs a liver transplant that he or she donate a lobe to keep the child alive.

IV. THE POLITICS OF COMPROMISE

Tribe illuminates why the privacy argument for access to medically safe abortions is not more popular and is losing ground in the courts. He nevertheless shows that the fundamental privacy and equal protection arguments for abortion choice are better than some critics imagine. Tribe attempts to reduce concern relating to the welfare of the unborn. However, he does not alter the fact that, for many, the fetal personhood question is a genuine barrier to wholehearted acceptance of constitutional privacy protection for abortion. It will remain so until acceptance of the feminist version of the history of reproductive laws overtakes concern for the fate of the unborn, or scholars like Tribe and Dworkin devise an appropriately persuasive argument for excluding, or limiting from consideration, the interests in and of the unborn.

The abortion debate in the United States illustrates that merely recounting feminist histories of women and reproductive law does not automatically convince pro-life proponents to abandon their demands for fetal protection and take up arms for women's privacy and equality. Vigorous, secure pro-choice abortion policies will require our society to more thoroughly value women, their judgments, and their contributions outside the home. Such a fundamental change in values cannot be legislated by fiat. Ultimately, for women's interests to be protected, the force of law must be imposed on the unpersuaded, as it has been since *Roe v. Wade*.

Although Tribe seems to appreciate the importance of judicial willing-

95. Cf. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987) (proposing a balancing test that recognizes governmental goals but prevents undue state intervention by valuing a woman's legal standing and bodily integrity).

ness to stand by anti-majoritarian and unpopular constitutional principles, he also clings to the possibility of broad public compromise. To set up his proposals for compromise, Tribe surveys abortion law and practices in other parts of the world and other periods of history. He describes the eugenic abortion policy of Nazi Germany to illustrate the evils of government over-involvement in individual choices: Under the Third Reich, a "genetically pure" Aryan woman who had an abortion was subject to the death penalty, while "genetically defective" women were sterilized.⁹⁶ Contemporary India, on the other hand, symbolizes the extreme of government under-involvement. In India, where there is a marked religious and economic preference for sons, the growing availability of amniocentesis has resulted in an increasing number of abortions for gender selection. Predictably, the result has been a disturbing imbalance in the male-to-female population ratio.⁹⁷

Abortion is also common in Japan, China, the Soviet Union, and Eastern Europe. In Japan, abortion has become the primary means of birth control due to an unusual level of fear about the safety of oral contraceptives and the scarcity of other means of contraception.⁹⁸ Overpopulation in China has led to laws that allow only one child per family; additional pregnancies are subject to compulsory abortion.⁹⁹ In the Soviet Union and Eastern Europe, where abortion is legal and adequate contraceptives largely unavailable, as many as four out of five pregnancies are terminated.¹⁰⁰

In most Western European countries abortion is legal, but only under certain circumstances, such as cases of rape or incest, or when the woman's health is endangered. Many of these countries also permit abortion where serious economic or social hardship for the woman would result. In France, a woman is entitled during the first ten weeks of pregnancy to judge for herself whether the hardship requirement is satisfied.¹⁰¹

Professor Mary Ann Glendon defends the Western European compromise—which officially permits abortion only in hardship cases, but allows women to assess the acuteness of their own circumstances—on the ground that it "combine[s] compassion with affirmation of life."¹⁰² Noting the absence of widespread controversy over abortion in Western Europe today, Tribe nonetheless rejects the Western European "compromise." Contrasting his view with Glendon's, Tribe counters that this apparent solution, "within an Anglo-American legal system that has long insisted that law be composed of *enforceable* norms, seems to teach mostly hypocrisy. . . . [It] is bound, in the long run, to offend American conceptions of equal justice."¹⁰³

Compromise, American style, must account not only for American legal

96. P. 59.

97. P. 65.

98. P. 60.

99. P. 62.

100. P. 56.

101. Pp. 71-73.

102. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 20 (1987).

103. Pp. 74-75.

expectations and ideals, but also for the realities of American politics. Tribe maintains that *Roe* galvanized pro-life supporters to organize in virtually every state election. The right-to-life movement succeeded in electing candidates sympathetic to its beliefs to Congress and state legislatures, but many elected officials were reluctant to act on such a controversial issue.¹⁰⁴ By 1984 it had become increasingly apparent that if *Roe* were to be overturned, the Supreme Court would have to do it. President Reagan appointed a third of the Court's members in his tenure. However, Tribe notes, the controversy that arose over Reagan's nomination of Judge Robert Bork—who openly expressed his belief that no constitutional right to privacy exists—“powerfully displayed how deeply entrenched was the belief among the American people that there had to be such a right.”¹⁰⁵ When the Supreme Court decided *Webster* in 1989, the newly threatened pro-choice movement raised the privacy flag whose “current popular appeal clearly depends on keeping the question focused on *who* will make the decision.”¹⁰⁶ *Webster* awakened a pro-choice movement which had been lulled into a sense of security in the sixteen years since *Roe*.

A number of states have already failed in their efforts to block access to abortion. For example, after *Webster* appeared to loosen lawmakers' reins, the Florida legislature nevertheless failed to pass antiabortion statutes. The Florida Supreme Court later declared a right to abortion under the state constitution, independent of *Roe* and the Federal Constitution.¹⁰⁷ Tribe rejects the argument, suggested by the experience in Florida, that overturning *Roe* and returning abortion to the states would have little or no impact on women's rights. He argues that if *Roe* was decided correctly and the Court properly recognized a constitutional right to abortion, this position is indefensible. Tribe argues that “making [women] fight for their reproductive liberty in the arena of politics, even if they do manage to win much of it back, is wrong—both morally and under our Constitution.”¹⁰⁸ Women should not have to expend time, money, and political resources vindicating a right that already belongs to them. Nor should they be forced to vote for pro-choice candidates who may not otherwise share their views, simply to gain recognition for rights they are legitimately afforded under the Constitution. Tribe's normative argument is sound, but the current composition of the Supreme Court makes it unlikely that the institution that he says ought to continue to recognize abortion privacy under the Constitution in fact will. The idea that abortion rights rest secure outside of the political arena cannot be sustained in the present context.

For Tribe, any realistic version of abortion compromise in this country must guarantee federal constitutional protection for choice. In the concluding chapters of his book, Tribe analyzes proposed “compromises” that do

104. Pp. 161-65.

105. P. 169.

106. P. 193.

107. *In re T.W.*, 551 So. 2d 1136 (Fla. 1989).

108. P. 194.

less than this, criticizing virtually all of them as attempts by the pro-life lobby to make abortions more difficult to obtain. Tribe then proposes what he regards as meaningful compromises, based on better contraceptive programs, childcare assistance, and new technologies. Regarding the false compromises, Tribe argues that, "although the compromises are designed to sound reasonable, they would sacrifice much more than they would accomplish."¹⁰⁹ Spousal consent requirements, for example, are relevant only where a woman wants to have an abortion against her husband's wishes. In such a situation, the wishes of only one party can prevail, and it is illogical to favor those of the husband over those of the wife, since she is the one who must bear the child. Parental consent requirements, too, operate on the assumption that the woman—or girl—should not make such an important decision on her own. Yet, Tribe points out, this reasoning implies that the parents would also be entitled to compel their immature daughter to have an abortion—a provision which, of course, is found nowhere in the law. Both spousal and parental consent requirements rob women of due autonomy.

Parental notification requirements, while seemingly less oppressive than parental consent laws, share the unfortunate effect of compounding the stress and anxiety of a pregnant minor. The reproductive choices of minors are of grave concern to many families and communities and may therefore seem to warrant paternalistic public intervention. However, as Tribe points out, it makes no sense to impede freedom of choice by imposing parental notification requirements that guarantee no pregnant girl meaningful parental guidance, while placing some at risk of parental rejection or abuse. Thus, Tribe explains, the consent and notification laws, which sound like good-faith attempts to foster family communication, in practice achieve little good and may cause much harm to already distressed women.¹¹⁰

Tribe takes particular exception to the abortion funding "compromise," which, with Supreme Court approval, restricts public support for poor women's abortions. Because the Court in *Roe* focused on the "negative" concept of privacy, rather than the "positive" concept of equal protection, Tribe deems it "unsurprising that the Court later held that government has no constitutional duty to help women exercise [the right to obtain an abortion]."¹¹¹ It is not clear, however, that the privacy rationale of *Roe* is the true culprit. Surely the Court could read equal protection, no less than privacy, as merely a "negative" right of noninterference rather than a positive right to government assistance. Tribe nonetheless correctly argues that denial of public funding for abortions in states where public assistance is available for childbirth but not for abortion creates a situation of inequality respecting indigent and affluent women and their families. This situation of distributive inequity, "is really no compromise at all and seems particularly immoral."¹¹² Reproductive freedom is too important to be allowed to de-

109. P. 197.

110. Pp. 202-03.

111. P. 206.

112. P. 207.

pend on so random a characteristic as the extent of a woman's wealth.

Professor Tribe thus argues that the commonly proposed compromises are not true compromises. Nominally, they purport to accommodate both pro-choice and pro-life viewpoints, but their real purpose is to reduce the number of abortions performed. These supposed compromises "promise abortion rights in principle but deny them in practice to those who are least able to bear the burden of motherhood—particularly the young, the uneducated, the rural, and the nonwhite."¹¹³ In order to achieve meaningful compromise, both absolutes must bend. The pro-life camp must recognize the rights of the woman, at least up to some point in pregnancy, as superseding those of the fetus, and the pro-choice camp must acknowledge that the beliefs of a significant sector of American society strongly disfavor unlimited abortion rights. The political "compromises" that Tribe regards as one-sided result from the lack of precisely this sort of bilateral concession.

In America, the most obvious starting point has been largely overlooked. Both sides would agree that reducing the number of unwanted pregnancies is desirable. Tribe proposes lowering the incidence of unwanted pregnancies in two ways. First, childbirth should be made more affordable—through better postnatal care programs, mandatory maternity and paternity leaves, subsidized childcare, and flexible time arrangements in the workplace. Such measures would somewhat alleviate the problem of pregnancies unwanted for economic reasons. Second, sex education and safe, effective contraception should be more widely available.

This two pronged, common sense approach has not yet been adopted in the United States. Impeding its adoption, Tribe stresses, are societal beliefs regarding private responsibility and the role of women as childbearers. The conservative groups generally in favor of abortion restrictions see no reason to support expensive postnatal care and contraception programs because they favor the traditional system, wherein women bear and raise the children.

Tribe discusses possible technological innovations that further illustrate his belief that outmoded stereotypes regarding women's roles are the foundation of restrictive abortion policy preferences. For example, development of an artificial womb that could nurture a transplanted fetus at any point after fertilization would seemingly satisfy the concerns of both the pro-choice and pro-life camps. Women would not be forced to endure unwanted pregnancies and childbirth, and fetuses would still grow into babies. Technological innovation is, however, no panacea. States that chose to ban abortion in reliance upon such technologies would have to bear the resulting costs, and nurturing the fetus, caring for the infant, and rearing the resulting children would be expensive. Even in the unlikely event that foster care could be found for every artificially nurtured fetus, the medical costs of such a program would be enormous. Thus, Tribe argues, one reason that such technological innovation has not occurred may be that "by comparison with

any technological alternative, women represent cheap 'baby machines.'"¹¹⁴ More so, some regard women as the only *morally appropriate* "baby machines."

A significant weakness in Tribe's analysis is his assumption that artificial womb technology would satisfy the concerns of all sides. Constitutional scholars have not adequately grappled with the possibility that some women who seek abortion are specifically, responsibly, and reasonably seeking to terminate the life of the potential child.¹¹⁵ Indeed, women who fear that nobody will want their children may prefer abortion to non-fatal pregnancy termination. A woman who knows her genetically related or gestational child will be placed in an artificial womb, foster home, or adoptive family may feel compelled to reject a mode of pregnancy termination that nonetheless results in biological parenthood. Women who carry fetuses that, because of their illness, handicap, or race, are unlikely to be well cared for by others might elect to parent rather than turn their children over to the state or private charities to become society's refuse.

V. CONCLUSION

For the sake of women's rights and the Constitution, Tribe searches for compromise. Tribe's extraordinary feminism is an appealing feature of his search: Mindful of history, he scrupulously avoids sacrificing women to mythical ideals of morality or majoritarian justice. Tribe believes that a public commitment to safe, effective contraception and to childcare programs would serve the ends of compromise by reducing the need for abortion. And, although he agrees that the jurisprudence of *Roe* is imperfect, Tribe insists that the Supreme Court should preserve the constitutional protection *Roe* affords women.

The Supreme Court will soon have another opportunity to overturn *Roe v. Wade*. The stage is set, for there are new faces on the bench and a series of precedents in place that criticize or ignore *Roe*. The Court is likely to seize its opportunity, and abortion policymaking will return substantially to the states. Some states, of which Florida and Connecticut are examples, have constitutional and statutory abortion protections already securely in place. But these protections are not permanently immune from politics, and in every state a bonfire of controversy potentially rages. Many states will enact and enforce statutes that leave women without equal protection or a meaningful set of private reproductive choices. Congress has already considered a pro-choice Freedom of Choice Act. However, under the current administration, a national pro-choice abortion rights statute is unlikely to survive.

The upshot of Tribe's book may not be the optimistic message he intended. The Court is poised to abandon *Roe*. If Tribe is correct, the Supreme Court's abandoning the right to choose would be a grand moral,

114. P. 225.

115. See Ross, *supra* note 3 (arguing that the death of the fetus may be a reasonable and responsible preference).

political, and constitutional error. At a minimum, the Court's abandoning *Roe* would make it that much harder for other institutions to mediate the clash of absolutes. It appears that the political burden of championing liberal abortion rights—which Tribe declares no woman should have to shoulder—will soon enough weigh heavily again on those who favor them.